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No. 92-1041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLARENCE TRIGG, Superintendent,
Indiana Youth Center,

Petitioner,

v.

JERRY KEOWN FORBES,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

WALTER C. CARLSON*
BRUCE M. ZESSAR
ANDREW G. KLEVORN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Respondent

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* *Counsel of Record*

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OPINIONS IN THE CASE

The decision of the Seventh Circuit is reported at 976 F.2d 308, and is reproduced in the Appendix to the Petition at page 1a. The decision of the district court is not reported, and is reproduced in the Appendix to the Petition at page 23a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. Respondent received service of the Petition on December 19, 1992. This Brief in Opposition thus is timely filed in accordance with U.S. Sup. Ct. R. 15.2.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

The constitutional provision, statutes, and regulation involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Petition generally sets forth the Statement of the Case in an adequate fashion. However, respondent submits the following brief statement of facts, drawn from the Seventh Circuit's decision below, *see* Pet. App. at 2a-6a, for a more complete statement of the facts of this case.

The basic facts relevant to the disposition of the Petition are the following. Respondent Jerry Forbes was an inmate at the Indiana Youth Center ("IYC") in Plainfield, Indiana during 1990. On August 7, 1990, Forbes was assigned to work in the Officer's Barber Shop in the Custody Building of the IYC, and he began working in the Officer's Barber Shop on August 13, 1990.

Sgt. Clinton Crider supervised all inmates working in the Custody Building.

Forbes alleged that when he reported to work on August 13, 1990, Sgt. Crider informed Forbes that he did not like the fact that Forbes had been assigned to the Officer's Barber Shop, that he did not like Forbes personally because Forbes was a "jailhouse lawyer," and that he would take whatever steps were necessary to have Forbes removed from the work assignment.

On August 15, 1990, only two days after Forbes began to work in the Officer's Barber Shop, Crider ordered workers in the Custody Building, including Forbes, to submit to a urine test. Forbes objected. Based upon this refusal, Sgt. Crider reported Forbes for refusing to obey an order from a prison staff member.

The prison's Conduct Adjustment Board ("CAB") convened to hear Sgt. Crider's charge against Forbes on August 21, 1990. There, Forbes admitted that he refused to take the urine test that Crider had ordered, but went on to state his objections to the test. Among other things, he argued that the urine test was an unreasonable search and seizure, ordered by Crider without any justification and for purposes of harassing Forbes and other inmates.

At the hearing, Forbes attempted to call three witnesses on his behalf: Sgt. Crider, Major Alexander (Sgt.

Crider's immediate superior) and Superintendent Trigg (warden of the prison facility). All three witnesses refused to appear. Alexander and Trigg gave no reasons for refusing to appear, while Crider stated that "I can not [sic] witness because I am the author of the [disciplinary] report." *See* Pet. App. at 3a. Because a regulation in the DOC "Adult Disciplinary Policy Procedures" ("ADPP") provides that prison staff members may refuse to appear at disciplinary hearings if they do not wish to appear, *see* Pet. App. at 49a, Forbes was powerless to obtain testimony from these witnesses.

Forbes appeared at the hearing and testified on his own behalf. There were no live witnesses presented on behalf of the prison authorities. Instead, the only evidence presented against Forbes consisted of Crider's conduct report and a medical refusal form, which Forbes signed when he refused to take the urine test. Based on this evidence, the CAB found Forbes guilty of the offense of refusing to obey an order of a staff member. The CAB then stripped Forbes of 30 days good-time credit.

Forbes' subsequent administrative appeals of the CAB's decision were denied. Forbes' petition for a writ of habeas corpus, based on the constitutional infirmities in the urine test to which he refused to submit and in the disciplinary proceedings against him, was denied by both the district court and the Seventh Circuit below. *See* Pet. App. at 1a.

ARGUMENT

I. CERTIORARI IS IMPROPER IN THIS CASE BECAUSE PETITIONER PREVAILED, AND ANY DECISION ON THE ISSUES PRESENTED WILL HAVE NO IMPACT ON THE OUTCOME OF THE CASE.

The issues on which Petitioner claims that Forbes "technically" prevailed concern a prisoner's right to call witnesses at a prison disciplinary hearing and the prisoner's right to a "meaningful" administrative review of a prison disciplinary decision. However, on both issues, Forbes in fact lost. The Seventh Circuit found that Forbes was denied neither the right to call witnesses nor a meaningful administrative review. *See* Pet. App. at 17a-18a, 20a. Furthermore, as noted above, Forbes' habeas petition was denied by the courts below. The Petition thus seeks to present issues that can have no effect on the outcome of the case.[1] "A favorable ruling . . . would do nothing more than answer a hypothetical question and perhaps provide guidance in future cases." *Burnett v. Kindt*, 780 F.2d 952, 954 (11th Cir. 1986). "The case has therefore lost its character as a present, live controversy of the kind that must exist if [the Court] is to avoid advisory opinions on abstract

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[1] It is also worth noting, which Petitioner failed to point out, that Forbes has been released from prison. Thus, Forbes -- who *lost* on his petition for a writ of habeas corpus, and who could be the only proper party to be petitioning for certiorari -- lacks "a legally cognizable interest in the outcome" necessary for filing a petition for certiorari in this case. "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (internal quote omitted).

propositions of law." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972), *quoting Hall v. Beals*, 396 U.S. 45, 48 (1969). The Petition is therefore moot, and should be denied.

II. THE SEVENTH CIRCUIT'S HOLDING, STRIKING DOWN THE INDIANA DEPARTMENT OF CORRECTIONS' RULE THAT OFFENDERS AND STAFF REQUESTED TO SERVE AS WITNESSES IN PRISON DISCIPLINARY HEARINGS ARE NOT REQUIRED TO APPEAR AND TESTIFY, PROPERLY CONFORMS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND WITH THE HOLDINGS OF THIS COURT.

Wolff v. McDonnell, 418 U.S. 539 (1974), establishes that a prisoner is entitled to certain minimum procedural safeguards in a prison disciplinary hearing where liberty interests are at stake, such as the good-time credits that the CAB revoked from Forbes.[2] One of the procedural safeguards provided in disciplinary hearings is the qualified right to call witnesses. *Id.* at 566.

As noted above, the DOC has a rule which provides, "Offenders and/or staff requested to serve as witnesses in disciplinary hearings are not required to appear and testify." Pet. App. at 49a. Forbes wished to call three witnesses to defend himself: Sgt. Crider; Major Alexander, Sgt. Crider's boss; and Supt. Trigg. All three witnesses refused to appear, and the only explanation given for why the CAB did not call these

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[2] The State of Indiana has codified the *Wolff* requirements in Ind. Code § 11-11-5-5 (relating to the type of hearing required for any disciplinary action), and §§ 35-50-6-4(c), 5, and 5.5 (relating to the type of hearing required when good-time credits may be revoked).

witnesses, in harmony with the ADPP regulation, was that they refused to appear.

Contrary to the allegations in the Petition, the Seventh Circuit correctly held that the ADPP regulation on witnesses is unconstitutional. In so doing, the Seventh Circuit followed the consistent line of court of appeals' decisions that have held similar rules unconstitutional, in violation of the rights set forth in *Wolff*.

A regulation similar to the ADPP regulation, which prevented a prisoner from calling two staff members at a disciplinary hearing because they would not voluntarily appear, was struck down by the Fourth Circuit in *Dalton v. Hutto*, 713 F.2d 75 (4th Cir. 1983). As the *Dalton* court noted, *Wolff* mandates that certain procedures be followed in prison disciplinary hearings to insure that due process is satisfied. The right to call witnesses has been qualified (*e.g.*, where calling witnesses would be unduly hazardous to institutional safety or correctional goals, or where the testimony would be irrelevant or unnecessary), but it remains a key part of the procedural due process that must be afforded inmates.

> [A] restriction to unrestrained "voluntariness" . . . exceeds the boundaries of constitutional fairness. One needs no "right" to call a witness who voluntarily presents himself to testify. . . . An inmate granted the right, albeit qualified, to call witnesses in his behalf loses it altogether, in any meaningful employment of language, if any witness may refuse to testify for no reason whatsoever. . . . "[T]he decision to preclude the calling of witnesses should be made on a

> case-by-case analysis of the potential hazards which may flow from the calling of a particular person."

Id. at 78, *quoting Bartholomew v. Watson*, 665 F.2d 915, 918 (9th Cir. 1982).

The decision in *Dalton* is well-reasoned, and one which has been followed by every court that has addressed the issue, as the Seventh Circuit below recognized. *See* Pet. App. at 15a-16a. *See also Ramer v. Kirby*, 936 F.2d 1102, 1104 (10th Cir. 1991); *King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985); *White v. Wyrick*, 727 F.2d 757 (8th Cir. 1984). Like the witness rule struck down in *Dalton*,

> The IDOC rule eviscerates the inmate's right to present witnesses. It vests unreviewable discretion to appear in correctional officials (like the charging officer) and other inmates who may have played significant roles in an inmate's disciplinary charge and punishment.

Pet. App. at 17a.

Requiring that "the decision to preclude the calling of witnesses should be made on a case-by-case analysis of the potential hazards which may flow from the calling of a particular person," *Dalton*, 713 F.2d at 78 (cite omitted), balances the needs of the prison system against the due process rights of prisoners. Indeed, the result follows logically from *Wolff*. *See Wolff*, 418 U.S. at 566 (disciplinary committees should state reasons for refusing to call witnesses, "whether it be for irrelevance, lack of necessity, or the hazards presented *in individual cases*" (emphasis added)). The decision of the Seventh Circuit also accords with this Court's disapproval of "across the

board" policies denying witness requests, *Ponte v. Real*, 471 U.S. 491, 496 (1985) -- as Petitioner himself concedes. Pet. at 9.

In an attempt to find a conflict among the circuits where none lies, Petitioner argues that the Eighth Circuit's decision in *White v. Wyrick* conflicts with the other circuit court authority cited above. *White* in fact accords with these cases. There, the Eighth Circuit distinguished between cases in which a prisoner faces a minor penalty (e.*g.*, a few days in solitary confinement) and those in which the prisoner's release from prison might be postponed, "either by affecting his eligibility for parole or by causing revocation of any good-time credits that he might have." 727 F.2d at 758. White merely faced the risk of ten days in solitary confinement; by contrast, the CAB in the instant case revoked 30 days of Forbes' good-time credits. Under the circumstances of the instant case, where good-time credits were revoked, *White* clearly accords with the holdings of the Seventh Circuit and the other courts cited above, that a rule such as the ADPP regulation permitting only voluntary witnesses at disciplinary hearings is unconstitutional. *See id.* *See also Moran v. Farrier*, 924 F.2d 134, 137 (8th Cir. 1991) (prison officials may not arbitrarily deny inmate's request to call witnesses at hearing).

Furthermore, Petitioner's argument that the Seventh Circuit's holding in this case and the holdings of the other circuit courts that have addressed the issue somehow mandate

"compulsory process" in every prison disciplinary hearings is flatly incorrect. What these decisions hold, quite simply, is that prison disciplinary officials should determine on a case-by-case basis, balancing the needs of the prison system and the due process rights of prisoners, whether a particular prisoner's witnesses should be called. *See supra*. If legitimate reasons exist for not calling a particular witness (*e.g.*, unduly hazardous to institutional safety or correctional goals, or testimony irrelevant or unnecessary), then the witness need not be called, as the Seventh Circuit recognized below, Pet. App. at 16a. *See also Wolff*, *supra*; *Dalton*, 713 F.2d at 77-78. But the decision as to whether a particular witness should be called to testify should not be made flatly on an "across the board" policy that excludes whole categories of witnesses. *See Ponte v. Real*, 471 U.S. at 496; Pet. App. at 16a-17a (cites omitted).[3]

The Seventh Circuit's decision on the ADPP witness regulation does not "mudd[y] the parameters of due process in prison hearings" (Pet. at 10), but rather clearly accords with the relevant holdings of the other circuit courts and this Court.

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[3] In this regard, Petitioner's speculation that "[t]he opportunity for inmates to retaliate against officers and other inmates by forcing them to attend and testify at disciplinary hearings will disrupt the balance so carefully considered in *Wolff*" (Pet. at 13) is meritless. As explained in the text, if legitimate reasons exist for not calling a particular witness, then the witness properly need not be called to testify. By requiring case-by-case consideration of whether a particular witness should or should not be called to testify, the Seventh Circuit's decision in this case preserves "the balance so carefully considered in *Wolff*."

It therefore does not present an appropriate basis for certiorari.

III. THE SEVENTH CIRCUIT'S STATEMENT THAT MR. FORBES HAD A DUE PROCESS RIGHT TO "MEANINGFUL" ADMINISTRATIVE REVIEW OF THE DISCIPLINARY SANCTION WAS CORRECT.

Ind.Code § 35-60-6-5.5 provides for the right to administrative review of prison disciplinary decisions. *See* Pet. App. at 57a. "While [the right to a meaningful review of a disciplinary decision] may only be implicit in *Wolff*, the State of Indiana gives the specific right to inmates, I.C. 35-50-6-5.5. . . . If a state imparts a due process right, then it must give that right." *Smith v. Stoner*, 594 F. Supp. 1091, 1110 (N.D. Ind. 1984). "A review cannot be merely pro forma, a review must be one of substance, reviewing all aspects of the prior proceedings." *Id.* *See also Feagin v. Broglin*, 693 F. Supp. 736, 739 (N.D. Ind. 1988).

In its decision below, the Seventh Circuit followed this line of authority, but held that Forbes, on the record presented, had been granted meaningful administrative review in this case. *See* Pet. App. at 20a. Petitioner argues that the Seventh Circuit's statement that "*Smith* is correct," Pet. App. at 20a, is incorrect. Certainly, as *Smith*, 594 F.Supp. at 1105, recognizes, a state-created procedural right, on its own, does not create a liberty interest. However, where a substantive right (in this case, Forbes' good-time credits) comes with

certain attendant procedural guarantees, officials must abide by those guarantees. *See Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (state went beyond simple procedural guidelines, requiring that certain procedures be employed, and that administrative segregation would not occur absent specified substantive predicates); *see also Smith* at 1110; *Feagin*, *supra*.[4] The Seventh Circuit's decision on the issue of "meaningful" administrative review thus presents no issue appropriate for certiorari.

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[4] Furthermore, "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974); *Superintendent v. Hill*, 472 U.S. 445, 460 (1985) (Stevens, J., concurring in part and dissenting in part) (*quoting Ross*). Even if the Seventh Circuit's statement went beyond the requirements of *Wolff*, "that is a manifestly insufficient reason for adding this case to [the Court's overburdened] argument docket." *Ponte v. Real*, 471 U.S. at 501 (Stevens, J., concurring in part). Indeed, as explained above, the questions presented in the Petition are moot.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

WALTER C. CARLSON*
BRUCE M. ZESSAR
ANDREW G. KLEVORN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Respondent

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* *Counsel of Record*

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CERTIFICATE OF SERVICE

I, Bruce M. Zessar, hereby certify that three copies of Respondent's Brief in Opposition to the Petition for Certiorari in this case, together with three copies of Respondent's Motion to Proceed In Forma Pauperis, were served upon counsel listed below by U.S. mail, first-class postage prepaid, on January 13, 1993, and that all parties required to be served have been served:

Wayne E. Uhl
Deputy Attorney General
Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204-2794

I declare under penalty of perjury that the foregoing is true and correct.

Bruce M. Zessar

Bruce M. Zessar
One of the Attorneys for
Respondent

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000